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No. 80-76.

In the
Supreme Court of the United States.

OCTOBER TERM, 1980.

JORGE LUIS VALDES,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

Reply Brief for Petitioner Jorge Valdes.

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Reply.

The government's Opposition attempts to narrow the question presented to a simple redetermination of facts presented to the courts below, ignoring the basic issues presented by petitioner. This petition raises substantial and unresolved questions concerning the standards and criteria to be used in determining release pending appeal — questions which affect thousands of criminal defendants yearly and which call for sorely needed guidance from this Court to establish proper and uniform standards throughout the federal judicial system.

The need for standards and criteria to assist the lower courts in assessing the use of conditions of release as an alternative to

incarceration pending appeal is one of the central issues raised which the government's Opposition has carefully ignored.

Under 18 U.S.C. § 3148 a finding of danger to the community is only a threshold. Yet the government's Opposition, and the courts below, appear unwilling to cross it to reach the ultimate statutory question: Are there any conditions of release that will obviate a perceived danger to the community? If so, incarceration pending appeal cannot be imposed. However, what criteria and standards should lower courts use in determining whether proposed conditions of release "reasonably assure" that no danger is posed? Must there be a good possibility that the proposed conditions will achieve their goal? a probability? a high probability? a virtual certainty? an absolute certainty? Guidance from this Court in this virtually uncharted area is needed to determine the appropriate standard and promote its uniform application by the lower courts.

This case exemplifies the need for such standards. Although required to state its reasons for refusing release in writing, the District Court in this case did not so much as mention the possibility of conditions of release as an alternative to incarceration, much less state why it believed them to be unavailing. Nor did the Court of Appeals discuss the basis for rejecting the substantially restrictive conditions proferred by petitioner in response to the District Court's expressed concern with his "life style" and the "possibility" of future drug trafficking. Indeed, from its complete silence as to conditions of release, it, like the lower court and the government's Opposition here, appears to have totally ignored this statutory prerequisite. Accordingly, certiorari should be granted to provide necessary guidance to the lower courts in their interpretation and application of this critical element of 18 U.S.C. § 3148.

Petitioner requested that this Court grant certiorari to provide an authoritative answer to the question of what degree of likelihood that predicted future conduct will occur is required to justify the denial of bail pending appeal. The government's response simply begs the question by alleging that petitioner was judged by the standard he suggests is appropriate. Indeed the government offers no suggestion as to what it believes to be the appropriate standard. Petitioner submits that examination of the opinions below demonstrates the error of the government's conclusion.* More importantly, he notes that the issue of the appropriate standard to be applied is one that is uniquely suited for and ripe for resolution by this Court. The denial of bail pending appeal is an increasingly common occurrence. However, a defendant should not be deprived of his liberty prior to final adjudication of the merits of his appeal under vague and amorphous standards shifting from court to court. A definitive answer is necessary and should be provided now.

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* The Court of Appeals analyzed the District Court's opinion, including the statement relied on by the government, as expressing a conclusion that there was a "possibility" of continued drug trafficking.

Finding application of a high degree of probability standard in the Court of Appeals' assessment that the "risk of continued drug activity by Valdes was so high that he is a danger to the community" is similarly unfounded. Did the court consider a "possibility" to constitute a sufficiently high risk? Or did it require a higher showing? Government prescience notwithstanding, petitioner maintains that the standard utilized cannot be determined from the opinions and that this Court should take this opportunity to provide guidance as to the proper standards to be applied in determining the existence of danger to the community.

Finally, in discussing what constitutes danger to the community the government, at page 4 of its Opposition, notes petitioner's failure to supply case support stating that participation in a major narcotics conspiracy does not pose a danger to the community. This absence of authority may well be attributable to the fact that when no danger is found and release pending appeal is granted, district courts do not generally write opinions for publication. However, in counsel's experience, and the experience of other defense attorneys known to counsel, many individuals convicted of participation in a major drug conspiracy have been continued on bail pending appeal following their convictions without the imposition of conditions of release other than continuation of, or a moderate increase in, their pre-trial bond.

Conclusion.

Accordingly, for the reasons set forth above and in the petition for a writ of certiorari, certiorari should be granted.

Respectfully submitted,

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